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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 536

W. H. BRINTON, PETITIONER,

vs.

THE FEDERAL LAND BANK OF BERKELEY,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The ground upon which petitioner contends he is entitled to a writ of certiorari can be stated succinctly as follows: Although on May 15, 1939, the District Court made an order relinquishing and terminating its jurisdiction over the mortgaged property, from which order no appeal was taken, the District Court set aside and vacated said order, out of time, when it entered its so-called nunc pro tunc order of February 23, 1940.

It must be conceded that unless said nunc pro tunc order had the effect claimed by petitioner, the decision of the Circuit Court of Appeals was correct under authority of *Union Joint Stock Land Bank* v. *Byerly*, 310 U.S. 7; 60 S.Ct. 773, and *Bernards* v. *Johnson*, 314 U. S. 19; 62 S. Ct. 30.

A brief resume of the pertinent facts and law will readily disclose the fallacy of the petitioner's contention.

On August 31, 1937, the Conciliation Commissioner recommended that the District Judge stay proceedings for three years. At that time the Judge took no action whatsoever on the recommendation. On May 15, 1939, the Judge made the order relinquishing and terminating the Bankruptcy Court's jurisdiction over the mortgaged property. On February 23, 1940, the Judge made the so-called nunc pro tunc order, the pertinent portion of which reads:

> "it is ordered that the recommendations of said referee be and the same is hereby approved nunc pro tunc as of August 31, 1937." (Tr. 10)

Petitioner seeks to have the order of February 23, 1940, construed as a rehearing granted by the District Judge out of time and by which the District Judge set aside and vacated his order of May 15, 1939. The order of February 23, 1940, was made on the *Court's own motion.* (Tr. p. 23. Finding No. 6.) It also shows on its face that it was another question which was before the Court on February 23, 1940, and in respect to which respondent's counsel was present. The last paragraph of the order reads:

> "Good cause appearing, it is ordered that hearing on order to show cause be continued until March 2, 1940." (Tr. 10)

Had the hearing been on the question of entering the nunc pro tunc order it is very evident that the matter would not have been continued.

We have been unable to find any authority under which a court may, upon its own motion, at the time set for hearing another matter, make an order which would in effect grant a rehearing and at the same time, without a hearing, set

aside and vacate a previous order terminating its jurisdiction over certain property.

The facts in this case do not show that the District Judge ever set aside and vacated the order of May 15, 1939, or ever *intended* to do so. They show just the opposite. On February 23, 1940, the Judge attempted to stay proceedings nunc pro tunc as of August 31, 1937. His sole intention was to supply an order he had previously failed to make. Had the stay order actually been entered on August 31, 1937, the order of May 15, 1939, would have been as effective, since it authorized the mortgagee to proceed with foreclosure, and terminated the Bankruptcy Court's jurisdiction over the property. The rule of the *Byerly* and *Bernards* cases would have been as applicable. Therefore, if we assume, without admitting, that the nunc pro tunc order of February 23, 1940, had any effect whatsoever, its effect was to stay proceedings as of August 31, 1937. The chronology would then be:

August 31, 1937—proceedings stayed;

May 15, 1939—*order authorizing foreclosure and terminating jurisdiction, from which no appeal was taken;*

September 30, 1939—foreclosure sale;

March 20, 1940—redemption period expired;

March 27, 1940—sheriff's deed delivered.

As a matter of fact, the order of February 23, 1940, had no effect whatsoever. *Wight* v. *Nicholson,* 134 U. S. 136, 10 S. Ct. 487; *Gagnon* v. *U. S.,* 193 U. S. 451, 24 S. Ct. 510. The rules pertaining to nunc pro tunc orders are well stated in 42 C. J. 534, 535, which we quote in part:

> "§ 221b. *Nunc pro tunc*—(1) *In General.* As a general rule, either on the application or motion of a party duly

entitled or by the court ex mero motu, an order may be entered nunc pro tunc to correct the entry of an order previously made not speaking the truth as to what was actually done or to make a record of what was previously done by the court and not then entered, especially where the result will be to effect or perfect an entry which should have been made as a matter of course and as a legal duty to prevent injustice . . . . . and the power to affect the operation of an order, or change its import by an order nunc pro tunc, should be exercised with caution and circumspection.

"§ 222 (2) *Necessity of Previous Order.* Where the court has wholly omitted to make an order, which it might or ought to have made, it cannot be made and entered nunc pro tunc after the time limited for making the order has expired; a nunc pro tunc entry cannot serve to supply the court's nonaction, to validate a void order, or to correct a decision however erroneous . . . ."

In *Gagnon* v. *U. S.*, *supra,* the court said:

"The power to recreate a record, no evidence of which exists, has been the subject of much discussion in the courts, and the weight of authority is decidedly against the existence of such power. We have examined a large number of authorities upon this point, and while they do not altogether harmonize in their conclusions, the practice in some states being much more rigid than in others, we have found none which supports the contention that a record may be created to take the place of one of which no written memorandum was made or entered at the time the original judgment was supposed to have been rendered."

In the instant case, the District Judge had neither attempted nor intended to make the stay order on August 31, 1937. He could not supply the omission by the so-called nunc pro tunc order of February 23, 1940. This case comes

squarely within the rule referred to in C. J. Section 222, above.

The petitioner contends that even though the order clearly shows that on February 23, 1940, the District Judge was attempting to do nothing but stay proceedings as of August 31, 1937, his inability to do so legally would result in an order staying proceedings as of the date of the attempt to make the nunc pro tunc order. The very name of such orders emphasizes the fact that they are retroactive in effect. When proper, they must relate back to "then." 42 C. J. 532, and cases cited.

In 42 C. J. 537 we find the following:

> "A nunc pro tunc entry of an order relates back and operates to make the order effective as of the date when it should have been entered;"

The District Judge had no intention to make the order effective on February 23, 1940. It is not the law that if a Judge intends to do one thing, but fails, his order will have some effect which was not in the mind of the Judge and which effect he did not intend. Without intending that the order should be effective as of February 23, 1940, it follows that the District Judge did not intend to set aside and vacate his order of May 15, 1939. If a judge has the power, on his own motion and without a hearing, to set aside such orders, it is submitted that the proof of such intention should be expressed in clear language and should not be left to inference.

That the District Judge did not intend to set aside and vacate the order of May 15, 1939, is affirmatively shown by the fact that in the findings in the order appealed from, dated October 4, 1941, he refers to the order of May 15, 1939, and says:

> "that no appeal has been taken from said order." (Tr. p. 23. Finding No. 5)

He also refers to the order of February 23, 1940. The order then states:

> "that said bankrupt has no interest in or to said property or any part thereof; and that this Court has no jurisdiction over said property, or any portion of same, in this proceeding or otherwise."

The District Judge would not have made this order if by his order of February 23, 1940, he had intended to set aside and vacate his order of May 19, 1939.

As mentioned in petitioner's petition for writ of certiorari, on page 15, the Court's jurisdiction "over the debtor and *other* property" continued after the order of May 15, 1939. As to such *other* property, which was not subject to its mortgages, respondent naturally had no objection to the entry of the order of February 23, 1940, regardless of what effect it may have had, and would not appeal therefrom.

The inescapable conclusion is that the District Judge did not, by his order of February 23, 1940, intend to set aside or vacate his order of May 15, 1939, and that, since no appeal was taken by petitioner, the decision of the Circuit Court of Appeals was correct under authority of *Union Joint Stock Land Bank* v. *Byerly, supra,* and *Bernards* v. *Johnson, supra,* and the petition for writ of certiorari should be denied.

Respectfully submitted,

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